A

ISMAIL DARMANSYAH

v.

PP

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COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NO: B-05-44-2008]

C

18 OCTOBER 2010

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Appellant convicted and sentenced to death - Appeal against - Whether judge should have invoked s. 37(da)(vi) of the*

D

Dangerous Drugs Act 1952 to establish ingredient of trafficking - Ingredient of possession - Whether established - Miscarriage of justice - Whether occasioned - Whether decision of High Court to convict and sentence unimpeachable - Whether prosecution established case beyond reasonable doubt

E

The appellant was charged at the High Court for trafficking cannabis weighing 1,726 grams, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act), and punishable under s. 39B(2) of the same Act. The learned judge convicted and

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sentenced him to death. The appellant filed this appeal against the conviction and sentence. Briefly, the facts were that the police, acting on information received, had conducted an observation on Restoran Dawood (the restaurant) in Shah Alam. The appellant was seen carrying a blue paper bag *ie*, P9 in his right hand walking

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towards the parking area in front of the restaurant and was there detained by the police personnel who had trailed him. A struggle ensued but he was finally subdued and restrained. P9, which was dropped by the appellant during the struggle, was seized and examined by SP5. A red plastic bag containing two slabs of

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compressed plant material was found in the paper bag. The appellant was then arrested and brought to the police station together with the exhibits. The Government Chemist (PW2) confirmed that the two compressed slabs found inside P9 contained 1,726 grams of cannabis as defined under s. 2 of the Act. The appellant was

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subsequently charged with trafficking of the offending drugs under the abovementioned s. 39B(1)(a) of the Act. The appellant

submitted that the learned judge should have invoked s. 37(da)(vi) of the Act in order to establish the ingredient of trafficking as there was no evidence of actual trafficking by way of direct or circumstantial evidence adduced by the prosecution. Relying on *Mohamad Yazri Minhat v. PP*, the appellant submitted that being seen carrying P9 containing the cannabis and walking along Jalan Serendit towards the car park did not automatically make him a drug trafficker.

Held (dismissing the appeal; affirming the order of the High Court)

Per Suriyadi Halim Omar JCA delivering the judgment of the court:

(1) The evidence adduced showed that SP5 saw the appellant walking, with P9 in his right hand, from Jalan Serendit heading towards the parking area in front of the restaurant. Having sifted the evidence, the learned judge made a finding of fact that sufficient evidence had been adduced to prove that the appellant had custody and control of P9. There was no error in this factual finding of custody or control of P9. The learned judge had rightly decided, as supported by the evidence of SP5 and buttressed by the police report (P18), to be followed by the invocation of s. 37(d) of the Act, there was sufficient evidence to establish the ingredient of possession. (para 14)

(2) The two compressed slabs of cannabis were wrapped in a transparent plastic tape and carried by the appellant inside P9 in his right hand. The compressed slabs of cannabis were seized from him after he dropped P9 on the ground in his bid to resist the arrest. Observing the manner how the drug was being handled *ie*, wrapped in two transparent plastic packages and hidden in P9, what with the total amount of drugs involved being large, the reasonable inference that could be drawn was that the appellant was in fact carrying it for the purpose of trafficking. By no stretch of the imagination could that large quantity of cannabis seized from him, which exceeded the minimum statutory presumptive limit carried around, was for his own consumption. There was no reasonable explanation supplied as to why he carried such a large quantity of the cannabis or even suggested that it was for his own consumption. At best he testified that P9 belonged to one 'Rom' but failed to support

A the allegation by any evidence, resulting in the considered view that this named person was an afterthought and a fabrication. From the totality of the evidence, this court was satisfied that he was carrying the said cannabis for the purpose of trafficking as defined under s. 2 of the Act. (para 17)

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(3) With the ingredient of trafficking capable of being established by affirmative evidence, and indeed was established, there was absolutely no necessity for the court to invoke the statutory presumption under s. 37(da) of the Act as suggested by the
C appellant, a course of action that would inevitably militate against the double presumption rule. (para 18)

(4) There was no miscarriage of justice occasioned. Nothing was found in the notes of evidence or grounds of judgment to indicate that such miscarriage of justice had taken place. The
D admissible evidence adduced was too overwhelming not to support the order of the learned judge (s. 60(1) of the Courts of Judicature Act 1964). With the ingredient of possession left unrebutted on a balance of probability, or the affirmative trafficking not rebutted at the stage of the defence, the decision
E of the High Court was certainly unimpeachable. The prosecution had established its case beyond reasonable doubt. (para 23)

Bahasa Malaysia *Translation Of Headnotes*

F

Perayu dituduh di Mahkamah Tinggi kerana mengedar kanabis seberat 1,726 gram, satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta itu'), dan dihukum di bawah s. 39B(2) Akta yang sama. Yang arif hakim menyabit dan mengenakan
G hukuman mati ke atas perayu. Perayu memfailkan rayuan ini terhadap sabitan dan hukuman. Secara ringkas, fakta-faktanya adalah bahawa pihak polis, bertindak atas maklumat yang diberi, telah menjalankan satu pengawasan di Restoran Dawood ('restoran itu') di Shah Alam. Perayu dilihat memegang beg kertas berwarna biru iaitu
H P9 di tangan kanannya menuju ke arah tempat letak kereta di hadapan restoran dan di situ telah ditangkap oleh pihak polis yang telah mengikutinya. Satu pergelutan berlaku tetapi akhirnya perayu disugul dan dikawal. P9, yang telah dilepaskan oleh perayu semasa pergelutan, dirampas dan diperiksa oleh SP5. Satu beg plastik
I berwarna merah yang mengandungi dua kepingan-kepingan bahan

tumbuhan mampat dijumpai di dalam bag kertas tersebut. Perayu kemudiannya ditangkap dan dibawa ke stesyen polis bersama-sama dengan eksibit-eksibit tersebut. Ahli Kimia Kerajaan (PW2) mengesahkan bahawa dua kepingan-kepingan bahan tumbuhan yang dijumpai di dalam P9 mengandungi 1,726 gram kanabis seperti yang ditakrifkan di bawah s. 2 Akta. Perayu kemudiannya dituduh mengedar dadah-dadah berbahaya tersebut di bawah s. 39B(1)(a) Akta seperti yang disebut di atas. Perayu berhujah bahawa yang arif hakim sepatutnya menggunakan s. 37(da)(vi) Akta tersebut untuk pembuktian bahan-bahan pengedaran kerana tidak terdapat keterangan pengedaran sebenar melalui keterangan terus atau keterangan ikut keadaan oleh pihak pendakwaan. Merujuk kepada *Mohamad Yazri bin Minhat v. PP*, perayu berhujah bahawa apabila beliau dilihat memegang P9 yang mengandungi kanabis dan berjalan-jalan di Jalan Serendit menuju ke arah tempat letak kereta tidak secara automatik membuat perayu seorang pengedar dadah.

Diputuskan (menolak rayuan; mengesahkan perintah Mahkamah Tinggi)

Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Keterangan yang dikemukakan menunjukkan bahawa SP5 melihat perayu berjalan, dengan P9 dalam genggaman tangan kanannya, dari Jalan Serendit menuju ke arah tempat letak kereta di hadapan restoran. Setelah melihat keterangan yang sedia ada, yang arif hakim telah membuat dapatan fakta bahawa keterangan memadai telah dikemukakan untuk membuktikan perayu mempunyai jagaan dan kawalan ke atas P9. Tidak terdapat kesalahan di dalam dapatan fakta jagaan dan kawalan ke atas P9. Yang arif hakim telah memutuskan dengan betul, seperti yang disokong oleh keterangan SP5 dan laporan polis (P18), diikuti dengan penggunaan s. 37(d) Akta, terdapat keterangan memadai untuk membuktikan elemen penting milikan.

(2) Kedua-dua kepingan-kepingan kanabis dibalut dengan pita plastik lutsinar dan dipegang oleh perayu di dalam P9 di genggaman tangan kanannya. Kepingan-kepingan kanabis telah dirampas dari perayu selepas perayu menjatuhkannya ke tanah dalam percubaannya untuk menentang penangkapannya. Melihat cara dadah tersebut dikendalikan iaitu dibalut dengan dua

bungkusan plastik lutsinar dan disembunyikan dalam P9, dengan jumlah keseluruhan dadah agak banyak, inferens munasabah yang boleh dibuat adalah perayu sememangnya membawa dadah tersebut bagi tujuan pengedaran. Tidak boleh dibayangkan bahawa jumlah kanabis sebanyak itu yang dirampas oleh perayu, yang melebihi had minimum berkanun praandaian, adalah untuk kegunaannya sendiri. Tidak terdapat penjelasan yang munasabah mengapa perayu membawa jumlah kanabis begitu banyak atau apa-apa yang menunjukkan bahawa ia adalah untuk kegunaannya sendiri. Paling kuat pun, perayu telah memberi keterangan bahawa P9 adalah kepunyaan satu 'Rom' tetapi gagal untuk menyokong dakwaan itu dengan apa-apa keterangan, mengakibatkan pandangan anggapan bahawa orang yang dinamakan tersebut adalah satu perkara yang difikirkan kemudian atau satu pemalsuan. Dari keseluruhan keterangan, mahkamah ini puashati bahawa perayu telah membawa kanabis itu dengan niat untuk pengedaran seperti ditakrifkan di bawah s. 2 Akta.

(3) Dengan unsur pengedaran yang boleh dibuktikan dengan keterangan afirmatif, dan telahpun dibuktikan, tidak terdapat keperluan untuk mahkamah menggunakan anggapan statutori di bawah s. 37(da) Akta seperti yang dicadangkan oleh perayu, satu tindakan yang boleh menjejaskan kaedah anggapan berganda.

(4) Tidak ada berlaku salah laksana keadilan. Tidak terdapat apa-apa di dalam nota keterangan atau alasan-alasan penghakiman yang menunjukkan salah laksana keadilan. Keterangan yang boleh diterimamasuk yang dikemukakan adalah terlalu banyak dan menyokong perintah yang arif hakim (s. 60(1) Akta Mahkamah Kehakiman 1964). Dengan unsur milikan tidak dipatahkan, atau pengedaran afirmatif tidak dipatahkan pada peringkat pembelaan, keputusan Mahkamah Tinggi tentunya tidak boleh dicabar. Pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah.

Case(s) referred to:

Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***
Chan Peon Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Chow Kok Keong v. PP [1998] 2 CLJ 469 FC ***(refd)***
Khoo Hi Chiang v. PP and Another Case [1994] 2 CLJ 151 SC ***(refd)***
Mohamad Yazri Minhat v. PP [2003] 2 CLJ 65 CA ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***

Ong Ah Chuan v. PP And Another Appeal [1980] 1 LNS 181 PC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
PP v. Tan Tatt Eek [2005] 4 CLJ 460 FC ***(refd)***
Surentheran Selvaraja v. PP [2005] 2 CLJ 264 CA ***(refd)***
Teh Geok Hock v. PP [1989] 2 CLJ 977; [1989] 1 CLJ (Rep) 160 SC ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60(1)
Dangerous Drugs Act 1952, ss. 2, 39B(1)(a), (2), 37(d), (da)(vi)

For the appellant - Hisyam Teh Poh Teik (Suzanawati Ismail with him); M/s Hisyam Teh Poh Teik
For the respondent - Siti Rafidah Zainuddin; AG's Chambers

[Appeal from High Court, Shah Alam; Criminal Trial No: 45-36-2006]

[Editor's note: For the High Court judgment, please see PP lwn. Ismail Darmansyah [2008] 1 LNS 892]

Reported by Suhainah Wahiduddin

JUDGMENT

Suriyadi Halim Omar JCA:

[1] The appellant was charged at the High Court for trafficking cannabis weighing 1726 grams, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act), and punishable under s. 39B(2) of the same Act. He committed that offence on 13 September 2005 at about 9pm in front of Restoran Dawood at Jalan Murai 6/1F, Shah Alam, in the State of Selangor. The learned judge convicted and sentenced him to death.

[2] The approach alluded to by the learned judge *enroute* towards the conviction was simple and straightforward. After the prosecution had successfully established custody or control of the bag (P9) that contained the impugned drugs by the appellant, the learned judge invoked the deeming provision of s. 37(d) of the Act, to establish the required ingredient of possession with knowledge. The learned judge after drawing inferences from the facts and circumstances of the case had concluded that the appellant was trafficking cannabis

A at the relevant time. The appellant then filed an appeal against the conviction and sentence of death, which appeal was heard by us, and whereupon the High Court order was upheld.

[3] The brief facts of this appeal are as follows. On 13 September B 2005, acting on information received, a police party headed by Chief Inspector Fadzir bin Othman (SP5) from the Narcotics Division of the Selangor Police Contingent Headquarters conducted an observation on Restoran Dawood (the restaurant), at Jalan Murai 6/1F, Seksyen 6, Shah Alam. He went there with 11 other police C personnel at about 8.30pm. The police party thereupon positioned themselves at strategic places, with SP5 positioning himself at a burger stall, next to the restaurant. At about 9pm. SP5 saw the appellant walking past him, carrying a blue paper bag ie, P9 in his right hand. He followed the appellant and gave a signal to three of D his men to follow him closely from the rear. The appellant walked into the parking area in front of the restaurant and there was detained by the police personnel who had trailed him. A struggle ensued but he was finally subdued and restrained. SP5 who was 10 feet away from the scene, walked towards the appellant and E seized P9, dropped by him during the struggle. SP5 examined the contents of P9 and found in it a red plastic bag containing two slabs of compressed plant material suspected to be cannabis. He then conducted a body search on the appellant and seized one UNHCR identity card bearing his name. The appellant was then F arrested and brought to the police station together with the exhibits. The Government Chemist (PW2) confirmed that the two compressed slabs found inside P9 contained 1,726 grams of cannabis as defined under s. 2 of the Act. With those facts in hand the appellant was subsequently charged with trafficking of the offending G drugs under the abovementioned s. 39B(1)(a) of the Act.

[4] As gauged from his written submission the appellant initially canvassed two grounds namely that the learned trial judge misdirected himself when failing to invoke the presumption of H trafficking under s. 37(da) of the Act (first ground) and there was doubt as to the identity of the drugs (second ground). Before us learned counsel for the appellant made a drastic change to the first ground and replaced it with an amended version in that the learned judge misdirected himself in coming to a finding that the appellant I was trafficking based on the presumption of possession and thereafter arriving at an inference that he was trafficking (the

amended first ground). Despite those changes the appellant never outrightly abandon the original first ground. The shift though outwardly appeared to be minor was not so. Learned counsel cleverly submitted that trafficking by inference *enroute* to establishing the trafficking ingredient was not a recognized evidential concept in law.

[5] The second ground was abandoned by the appellant.

[6] Before discussing whether the establishment of the ingredient of trafficking by inference is a recognized evidential mode some explanation is required why the learned judge made an affirmative finding of trafficking by inference rather than alluding to a presumption provision (and the legal correctness of it). The learned judge had authored:

> Dalam konteks kes ini saya berpendapat tidak ada inferens yang lain yang semunasabahnya dapat dibuat yang memihak kepada OKT dalam keadaan yang menyelubungi kes di hadapan saya tentang pemilikannya terhadap dadah cannabis semasa dia ditangkap di malam kejadian. Saya putuskan daripada keterangan yang ada di hadapan mahkamah ini, terdapat keterangan pada tahap *prima facie* yang menjurus kepada cara bagaimana dadah tersebut telah dibawa oleh OKT dan jumlahnya saya dapati telah terbukti secara inferens yang munasabah oleh TPR bahawa OKT ini telah melakukan kegiatan pengedaran dadah pada masa kejadian. Nas dalam Mahkamah Persekutuan *PP v. Mohd Manaf Muhammad Hassan* [2006] 2 CLJ 129 adalah terpakai.

[7] To reiterate, the appellant's grouse was that the learned judge should have invoked 37(da)(vi) of the Act in order to establish the ingredient of trafficking. The reason amongst others, as ventilated was that there was no evidence of actual trafficking by way of direct or circumstantial evidence adduced by the prosecution. Relying on *Mohamad Yazri Minhat v. PP* [2003] 2 CLJ 65 the appellant submitted that being seen carrying P9 containing the cannabis and walking along Jalan Serendit towards the car park did not automatically make him a drug trafficker.

[8] The appellant further suggested that the prosecution could bring home the charge of trafficking only either by invoking the trafficking presumption under s. 37(da) of the Act upon an affirmative finding of possession or invoking the presumed possession under s. 37(d) of the Act and thereafter call in aid

A evidence of trafficking by reason of the trafficking definition provided under s. 2 of the Act. Here it was canvassed that the learned judge never called in aid the trafficking definition.

[9] Niceties aside, it was obvious that it was the prosecution who
B suggested the invocation of the presumption of knowledge under s. 37(d) of the Act in order to establish the ingredient of knowledge. The learned judge did not disappoint the learned DPP as he did exactly just that. In crystal clear terms the learned judge, as authored in his grounds of judgment, had said that the
C prosecution was successful in establishing that the appellant had custody or control of P9, which contained the drugs. Alluding to s. 37(d) of the Act therefrom, the learned judge wrote that the appellant was thus presumed to have possession of the drugs and knew the nature of the drugs.

D **[10]** Having alluded to the above statutory deeming provision the learned judge had correctly stated the law when he wrote that, having exhausted the presumption of knowledge he was embargoed from invoking s. 37(da) of the Act, to establish the ingredient of
E trafficking. In *Muhammed Hassan v. PP* [1998] 2 CLJ 170 the Federal Court opined:

> In our view, to constitute 'possession' under s. 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be
F an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

[11] Arifin Zakaria FCJ (as he then was) in *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129 at 145 later clarified:

G > It ought to be stated at the outset that the decision in *Muhammed bin Hassan* only prohibits the use of double presumption under s. 37(d) and s. 37(da) of the Act. It is, therefore, open to the prosecution to rely on either of the presumption. In other words, the prosecution may positively prove possession without relying on
H the presumption under s. 37(d) of the Act and go on to rely on the presumption of trafficking under s. 37(da) of the Act to support a charge under s. 39B of the Act. See *Tunde Apatira & Ors v. Public Prosecutor (supra)*; *Msimanga Lesaly v. Public Prosecutor* [2005] 1 CLJ 398 (a decision of the Court of Appeal which was confirmed by this court in Federal Court Criminal Appeal No. 05-27-
I 2004(K). *Conversely, the prosecution my rely on the presumption under s. 37(d) to prove possession and seek to prove by affirmative evidence (independent of presumption under s. 37(da)) that the accused was in fact trafficking in the dangerous drug* (emphasis added).

[12] With the learned judge having earlier invoked s. 37(d) of the Act to establish *mens rea* of the drugs and embargoed from invoking any other presumption, the learned judge therefore had only the direct evidence option to establish the ingredient of trafficking. And this was exactly what the learned judge did, an act which was in consonant with the current legal thinking.

[13] Before deciding whether his mode of arriving at an affirmative trafficking, as opposed to presumptive trafficking is legally acceptable or not ie, before the defence was called, a need arises for us to sift through the evidence and decide whether the ingredient of possession was indeed successfully established. At the risk of being repetitive, the evidence adduced showed that SP5 saw the appellant walking, with P9 in his right hand, from Jalan Serindit heading towards the parking area in front of the restaurant. Having sifted the evidence the learned judge made a finding of fact that sufficient evidence had been adduced to prove that the appellant had custody and control of P9. We failed to find any error in this factual finding of custody or control of P9.

[14] The learned judge could have taken the easy way out by making a factual finding that the appellant's subsequent attempt to struggle and dropping of P9 on the ground, pointed to knowledge of the contents, but to his credit refrained (*Parlan Dadeh v. PP* [2009] 1 CLJ 717). To be fair to the learned judge, this factor of conduct was indeed considered by him, as he cited the principle discussed in *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 when he opined that the appellant's conduct could equally be the reaction of an innocent but surprised person. As at this stage suffice to say that the learned judge rightly decided, as supported by the evidence of SP5 and buttressed by the police report (P18), to be followed by the invocation of s. 37(d) of the Act, there was sufficient evidence to establish the ingredient of possession.

[15] We now touch on the factual finding of the learned judge when he concluded that the appellant was in fact trafficking the impugned drugs when arrested carrying the 1726 grams of cannabis. In *Abdul Manaf Muhammad Hassan (supra)* at p. 145 the Federal Court had admitted that the definition of trafficking under the Act included the term 'carrying' (see also *Teh Geok Hock v. PP* [1989] 2 CLJ 977; [1989] 1 CLJ (Rep) 160). To resolve this issue the

A Federal Court had zeroed in on s. 2 of the Act in light of the set of facts showing that the respondent was 'in fact carrying' the said drugs. This provision, which clearly includes carrying as part of the definition, reads:

B > "trafficking" includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, **carrying**, sending, delivering, procuring, supplying, or distributing any dangerous drug otherwise than under the authority of this Act or the regulations under the Act; (emphasis added).

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[16] It can never be overly emphasized that the mere act of carrying the drugs *per se* is not sufficient to constitute the offence of trafficking, as discussed in *Ong Ah Chuan v. PP And Another Appeal* [1980] 1 LNS 181. Further, the fact that the appellant was
D carrying the drugs from one point to another did not make him an automatic trafficker. Whether he was a trafficker in such a circumstance depends on the facts and circumstances of the given case, including the quantity of the drugs and any transaction the accused proposed to enter into.

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[17] It was a fact that the two compressed slabs of cannabis were wrapped in a transparent plastic tape and carried by the appellant inside P9 in his right hand. The compressed slabs of cannabis were seized from him after he dropped P9 on the ground in his bid to
F resist the arrest. Observing the manner how the drug was being handled ie, wrapped in two transparent plastic packages and hidden in P9, what with the total amount of drugs involved being large, the reasonable inference that could be drawn was that the appellant was in fact carrying it for the purpose of trafficking. By no stretch
G of the imagination could that large quantity of cannabis seized from him, which exceeded the minimum statutory presumptive limit carried around at Jalan Murni, was for his own consumption. Having said that we were fully aware that a defence of self-consumption might be available even where the quantity of drugs
H involved was in excess of the statutory minimum prescribed under s. 37(da) of the Act, though the success of that defence will depend very much on several factors (*Chow Kok Keong v. PP* [1998] 2 CLJ 469). Unfortunately here there was no reasonable explanation supplied as to why he carried such a large quantity of the cannabis
I or even suggested that it was for his own consumption. At best he testified that P9 belonged to one 'Rom' but failed to support the

allegation by any evidence, resulting in our considered view that this named person was an afterthought and a fabrication. From the totality of the evidence we were satisfied that he was carrying the said cannabis for the purpose of trafficking as defined under s. 2 of the Act.

[18] With the ingredient of trafficking capable of being established by affirmative evidence, and indeed was established, there was absolutely no necessity now for the court to invoke the statutory presumption under s. 37(da) of the Act as suggested by the appellant, a course of action that would inevitably militate against the double presumption rule. It was based on the above facts that the defence was called, and without any reasonable explanation to the charge when the defence was called, the learned judge had no other alternative but to find him guilty.

Was Any Error Committed By The Learned Judge When He Alluded To Inferences In Order To Arrive At A Finding Of Trafficking?

[19] In drugs cases the beaten path often used by a DPP to establish the ingredient of knowledge is either by the invocation of s. 37(d) of the Act or made pursuant to conclusions from the set of facts adduced in court. The law as it stands mandatorily requires the prosecution to prove that the accused person knows of his possession and knows the nature of the offending item possessed. To successfully establish that state of mind by direct evidence is a near impossible task hence the need by the prosecution to resort to a deeming provision, or allusion to inferences to prove knowledge or to put it in a more colloquial term, "he must have known it" (*Chan Peon Leon v. PP* [1956] 1 LNS 17). Resort to inferences will be untenable if there are other possible inferences as it is the established principle that the inference most favourable to the accused person must be drawn in his favour.

[20] But is this concept of establishing the ingredient of trafficking by inference as challenged by the appellant approved by courts? To resolve this question we need to refer to certain cases which have had a brief brush with it. We begin with *Surentheran Selvaraja v. PP* [2005] 2 CLJ 264, where Abdul Aziz JCA opined, though pertaining to the issue of knowledge, that in almost every case proof of

knowledge has to be by way of inference from the proven circumstances-and one set of circumstances differs from another, and in any given case whether knowledge is inferable depends on the particular circumstances of the case and proper appreciation of them. *PP v. Abdul Manaf Muhamad Hassan (supra)* more on point when alluding to the approach by inference said:

> Judging from the manner the drug was being carried ie, in small plastic packets and taking into account the total amount of the drug involved, the reasonable inference that may be drawn is that the respondent was in fact carrying it for the purpose of trafficking (emphasis added).

[21] At the end of the appeal, based on the above finding of facts, the order of the Court of Appeal was set aside and the conviction and sentence order imposed by the High Court was reinstated and affirmed by the Federal Court. Nik Hashim FCJ in *PP v. Tan Tatt Eek* [2005] 4 CLJ 460 at 466, had also occasion to discuss this issue when he said:

> Thus, ... what is required is that in order for the prosecution to ask the court to draw any inference, it must provide the court with clear evidence of a set of facts which leave no other possible alternative inference which can reasonably be drawn ... .

[22] From the samples of the above precedents, be it for establishing the ingredient of knowledge, trafficking, or for that matter any ingredient of a charge, the allusion to inferences from the set of facts and proven circumstances is actually a settled matter. That being so with this mode a recognized evidential approach the learned judge therefore was never in error when alluding to it.

[23] On the improbable possibility that the learned judge had erred here by seriously misdirecting himself, be it on the issue of inference or failing to invoke s. 37(da) of the Act (which would have contravened the rule against double presumption in the circumstances of the case), we found no miscarriage of justice having been occasioned. Nothing was found in the notes of evidence or ground of judgment to indicate that such miscarriage of injustice had taken place. The admissible evidence adduced was too overwhelming not to support the order of the learned judge (s. 60(1) of the Courts of Judicature Act). Alluding again to the

above case of *PP v. Abdul Manaf Muhamad Hassan*, Arifin Zakaria FCJ relying on *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381, had occasion to remark:

> ... as a general rule, the appellate court will in the normal course of event, quash a conviction where there has been misdirection. Exceptionally, it said, a conviction will be upheld despite a misdirection where the court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. In other words, the court would still uphold the conviction despite the misdirection where no miscarriage of justice has been detected.

[24] In *Khoo Hi Chiang v. PP and Another Case* [1994] 2 CLJ 151, the Supreme Court opined:

> ... even though the trial judge in that case had applied the wrong test when calling for the defence, the error was of no consequence and did not vitiate the conviction, because even if he had applied the more stringent test, the result would have be the same having regard to overwhelming nature of the case for the prosecution ... .

[25] To summarise this sub-issue, as a general rule this court will normally quash a conviction where there has been misdirection but not in certain exceptional circumstances despite that misdirection. If we are satisfied that a reasonable tribunal will convict the accused on the available evidence on a proper direction the conviction will be upheld. On the other hand if a miscarriage of justice has taken place such conviction will not be sustained.

[26] Returning to the mainstream, with the ingredient of possession left unrebutted on a balance of probability, or the affirmative trafficking not rebutted at the stage of the defence, the decision of the High Court was certainly unimpeachable. After testing the totality of the evidence adduced by the appellant with that of the prosecution we were satisfied that the prosecution had established its case beyond reasonable doubt. On that premise we had no other alternative but to dismiss the appeal and affirm the order of the High Court.